Supreme Court, U.S.
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No. 93-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARK G.A. WELSH, a minor, and ELLIOTT A. WELSH, his father and next friend,

Petitioners,

v.

BOY SCOUTS OF AMERICA and BOY SCOUTS OF AMERICA WEST SUBURBAN COUNCIL #147,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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Dated: November 11, 1993

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QUESTIONS PRESENTED

1. Whether Title II of the Civil Rights Act of 1964 can be applied to invalidate membership requirements that are central to the moral and spiritual values a private volunteer membership organization was formed to transmit?

2. Whether applying Title II of the Civil Rights Act of 1964 to force Boy Scouts of America to accept members who reject Scouting's core values, including in this case belief in God, violates the constitutional rights of association of the Boy Scouts and its volunteer members and leaders?

LIST OF PARTIES

The parties to the proceeding are:

Petitioners Mark G.A. Welsh and Elliott A. Welsh; and Respondents Boy Scouts of America and West Suburban Council Boy Scouts of America.*

There are no parent companies, subsidiaries or affiliates to list. Boy Scouts of America is a congressionally chartered corporation pursuant to 36 U.S.C. §§ 21-29. Boy Scouts of America and West Suburban Council Boy Scouts of America are not-for-profit corporations without stockholders.

* Respondent West Suburban Council Boy Scouts of America was sued under an incorrect name in the complaint.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988), provides in relevant part:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> > (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this subchapter if . . . (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . .

. . .

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

42 U.S.C. § 2000a (1988).

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RESPONDENTS' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

The respondents, Boy Scouts of America ("Boy Scouts") and West Suburban Council Boy Scouts of America ("West Suburban Council"), submit this brief in response to the petition for certiorari filed by petitioners Mark G.A. Welsh and Elliott A. Welsh. While respondents disagree with petitioners' statement of the issues and questions presented, they support the request for certiorari and urge that certiorari be granted on the questions set forth in this Brief in Response.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court was entered on May 17, 1993. On August 3, 1993, Justice Stevens ordered that the time for filing the petition for writ of certiorari be extended to and including October 14, 1993. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

This case presents important questions of the scope of Title II of the Civil Rights Act on which the court of appeals divided. The questions are important because, as both the dissent and majority agreed, they are inseparable from an even more basic constitutional question: the First Amendment rights of the members of Boy Scouts to form an association for the purpose of expressing, transmitting and reinforcing certain values and beliefs, including religious ones, and to limit membership to those who share those values and beliefs.

These rights are now being attacked by a variety of plaintiffs in a variety of jurisdictions across the country under state as well as federal public accommodation laws. Definitive guidance by this Court is required lest these rights, and the interests they protect, be lost through sheer attrition. As demonstrated below, this is an appropriate case with an appropriate record to supply that guidance.

Elliott Welsh and his son Mark brought this action under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a ("Title II"), to challenge the denial of their application for membership in Cub Scouts. The denial of membership was

based on the fact that, as agnostics, Elliot Welsh refused to subscribe to Scouting's Declaration of Religious Principle and Mark Welsh refused to subscribe to the Cub Scout Promise in the Cub Scout membership application.

Petitioners argue, as did the dissent in the court of appeals, that the majority decision holding Title II inapplicable to this denial of membership "conflicts with this Court's decisions" and "unduly restricts the scope of an important remedial civil rights statute." (Petition for Writ of Certiorari at 6.)

The majority's disputed construction of Title II was clearly shaped by consideration of the constitutional principle of freedom of association, a constitutional principle which the dissent felt had to be invoked in order properly to decide the case. As discussed below (*infra* at 22-23 & nn. 8-10), these interrelated statutory and constitutional issues have arisen again and again as litigants have challenged Scouting's membership policy under federal and state public accommodation laws around the country.

The right of association of Boy Scouts and other groups to limit membership to those who accept the association's moral and religious values is of little practical consequence if the members must defend themselves in full dress constitutional litigation in jurisdiction after jurisdiction simply to practice their beliefs. To be sure, the vast majority of cases have to date been correctly decided. That fact, however, does not negate the danger of loss of members' associational rights, not to mention the cost incurred in time and money, through constant litigation and occasional adverse trial court or administrative decisions that infringe associational freedoms. For example, sixteen months ago, in a case not yet argued at the intermediate appellate level in California, a trial judge ordered the Boy Scouts to admit into a Cub Scout Den two boys who, while believing in Santa Claus and the tooth fairy, did not

believe in God, and ridiculed those who do believe by telling a radio talk show host: "I mean, hey, is there somebody out there in fickelydoodle land?" *Randall v. Boy Scouts of America*, No. 650394 (Orange County Super. Ct. June 30, 1992), *appellate argument scheduled*, No. G012774 (Cal. Ct. App. Nov. 16, 1993).[1]

There are limits on the financial and administrative capacity of any volunteer organization to litigate these cases in forum after forum. Even when the wherewithal to continue litigation exists, the diversion of members' time and energies and the dissipation of their financial and other resources cannot help but undermine a volunteer organization's ability to fulfill its goals.

Belief in and Duty to God and Boy Scouts' Methods of Transmitting Values

The nature of Scouting's programs and values and the reasons for excluding those who do not accept those values are reflected in detailed and meticulously documented factual findings by the district court, which were not challenged on appeal. *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992) (B-1); *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (D-1).[2]

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[1] Michael Randall made this statement on April 26, 1991 during an interview on Tom Lyekis's radio talk show. The transcript of this interview was admitted into evidence during the *Randall v. Boy Scouts of America* trial as Exhibit 340.

[2] References to "A__", "B__", "C__", and "D__" are to pages of the Appendix which are attached to the Petition for Writ of Certiorari. Petitioners inadvertently misnumbered pages B-2 to B-52 in Appendix B as C-2 to C-52. To avoid confusion respondents have provided the parallel citations in the official reporter.

There has never been any dispute that Boy Scouts is a *bona fide* non-profit membership organization dedicated to instilling values, including the value of doing one's duty to God, in boys and young people who join as members. *Welsh*, 787 F. Supp. at 1515, 1518 (C-6, C-11) (Stip. ¶ 10; Findings ¶ 1).[3] It is also undisputed that Boy Scouts requires as a condition of membership that all applicants recognize a duty to God, and that petitioners were not permitted to become members because they would not subscribe to that requirement. *Id.* at 1515, 1517 (C-6, C-10) (Stip. ¶¶ 7, 41-44).

The values set forth in the Boy Scout Oath and the Boy Scout Law are intended to be guides for living. *Welsh*, 787 F. Supp. at 1518 (C-11) (Findings ¶ 1) (S.A. 149-50, 152-54).[4] The Scout Oath or Promise has remained unchanged since the first Boy Scout Handbook was published in 1911. *Id.* at 1515 (C-6) (Stip. ¶ 11). It states:

> On my honor I will do my best to do *my duty to God* and my country and to obey the Scout Law, to help people at all times, to keep myself physically strong, mentally awake and morally straight.

Id. (C-6) (Stip. ¶ 11) (emphasis added). The Scout Law provides that a Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean and *Reverent*. *Id.* (C-6) (Stip. ¶ 12) (emphasis added).

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[3] References to "Stip. ¶ _" are to facts stipulated by the parties prior to trial and specifically relied upon by the district court. *See Welsh*, 787 F. Supp. at 1514-18 (C-4 to C-11). References to "Findings ¶ _" are to the district court's independent findings of fact. *See Welsh*, 787 F. Supp. at 1518-21 (C-11 to C-17).

[4] References to "S.A.___" are to pages of the Supplemental Appendix filed in the court of appeals. The record has not been certified to the Court at this time, but will be certified upon the Court's request.

In addition to the Boy Scout program for boys eleven to eighteen, Boy Scouts provides the Cub Scout program for boys eight to ten and the Tiger Cub program for seven-year-old boys. *Welsh*, 787 F. Supp. at 1514-17 (C-5, C-7, C-9) (Stip. ¶¶ 3, 18, 32) (S.A. 14, 49). In each program, a boy seeking to join must take an age-appropriate promise. *Id.* at 1515-17 (C-6, C-9) (Stip. ¶¶ 7, 18, 40). The Cub Scout Promise begins "I, (name), promise to do my best [t]o do my duty to God," while the Tiger Cub Promise begins "I promise to love God." *Id.* at 1516-17 (C-7, C-9) (Stip. ¶¶ 20, 33).

The structure of Boy Scouts emphasizes group activities under the direction of adult volunteers who act as role models as well as leaders. *Welsh*, 787 F. Supp. at 1515-16, 1519-20 (C-6 to C-7, C-13 to C-14) (Stip. ¶¶ 10, 16, 20; Findings ¶¶ 4-6) (S.A. 37-38). Members are organized into groups which consist of dens or patrols of six to eight boys of the same age, several of which meet together monthly as a pack or a troop. *Id.* at 1515-16, 1519-20 (C-6, C-8, C-13 to C-14) (Stip. ¶¶ 8, 23-24; Findings ¶¶ 4-5). Much of what a boy does as a member of Boy Scouts he does in the context of these groups. *Id.* at 1519 (C-13 to C-14) (Findings ¶¶ 4-6). A Cub Scout participates in regular meetings with his Den, which are generally held weekly in the home of his Den leader. *Id.* at 1516, 1519-20 (C-8, C-13 to C-14) (Stip. ¶¶ 23-24; Findings ¶¶ 4-6). Scouting transmits its values to youth members through the use of these small, primary groups. *Id.* at 1515-16, 1519-20 (C-6, C-8, C-13 to C-14) (Stip. ¶¶ 8, 23; Findings ¶¶ 4-6).

Boys in a Cub Scout Den are expected to advance together by fulfilling the requirements for one of the four basics ranks in Cub Scouting (Bobcat, Wolf, Bear, and Webelos) each year, working on them in Den meetings, by themselves and at home

with their parents. *Id.* at 1516, 1520 (C-7 to C-8, C-14) (Stip. ¶¶ 19, 20, 23); (S.A. 10, 47). Each rank has a requirement based on duty to God. (S.A. 55, 78-80, 91-96, 106-107.) For example, the first achievement in the Bear book requires that a Cub Scout, to achieve the Bear rank, must either practice his religion as he is taught at home or in his religious community, or work with his religious leader to earn the religious symbol of his faith. (S.A. 11, 91-96.)

The Cub Scout Promise is recited in unison at these meetings as a group-building and value-reinforcing activity. (S.A. 161-62.) If some members of a Cub Scout Den did not recognize a duty to God or other parts of the Promise, it would destroy the group's unity and minimize the effectiveness of Scouting leaders' efforts to transmit Scouting values. (S.A. 213-15, 223.) The impact of the Cub Scout leader and of the Den itself in reinforcing values through processes of small group socialization such as "normative advocacy" and "modeling" would also be undermined. (S.A. 216, 223-24.) Making the duty to God value "optional" would prevent the Den leader from strongly advocating that value, and minimize the effectiveness of the group in influencing the individual to internalize those values. (S.A. 216, 223-24.)

In addition, without the requirement that members recognize a duty to God, many volunteer leaders would not devote their efforts to Scouting and there would be a significant loss of religious sponsorship and involvement, thereby weakening Boy Scouts as an expressive voice. (S.A. 160, 186, 198-99, 203-04, 228-29.)

The District Court

Boy Scouts moved to dismiss the complaint on the grounds that Title II does not apply to Boy Scouts, and that in any event

it would be unconstitutional to apply Title II to Boy Scouts. *See Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990) (D-1). The district court denied Boy Scouts' motion to dismiss, ruling that it could not accept Boy Scouts' arguments "without giving plaintiffs an opportunity to gather and present factual evidence." *Id.* at 1418 (D-5). Later, the district court denied the Welshes' summary judgment motion, reasoning that "this case is to a great extent one about the Boy Scouts' nature, its conduct, its true purposes, and its methods of achieving them. Only in resolving these factual questions can the Court decide the [statutory and constitutional] issues posed by this suit." *Welsh v. Boy Scouts of America*, No. 90 C 1671, 1991 U.S. Dist. LEXIS 5979, at *10, 1991 WL 78179, at *3 (N.D. Ill. May 6, 1991) (C-1, C-5).

Upon review of the full trial record about Boy Scouts' "nature," "conduct," "true purposes," and "methods," the district court concluded that groups of Cub Scouts and their parents and volunteer leaders who meet in a variety of locales from homes and backyards to church basements to parks and campgrounds are not "places," much less "places of entertainment" within the meaning of Title II. *Welsh*, 787 F. Supp. at 1538-39 (C-47 to C-49). The district court observed that "[p]rivate homes, for example, are rarely thought of as places of public accommodation . . . and to use the family home as the site which triggers Title II coverage would raise serious constitutional concerns." *Id.* at 1539 (C-48).

In reaching its conclusion that Congress had not intended Title II to apply to membership in Cub Scouting, the district court took particular cognizance of the interference with constitutional associational rights which would arise if the statute were given a broader reach:

> For where the benefits of membership flow primarily, if not exclusively, from the interpersonal association among the people who belong to the organization rather than . . . the physical accoutrements of a particular facility, the rival interests implicated by exclusion of an individual from the group become more difficult to resolve . . . . *The Court merely cites the clash between individual and associational rights* which is highlighted in the context of this case . . . as yet another signal that *entities like the Boy Scouts are almost certainly beyond the realm of establishments which Congress intended to reach through Title II.*

Welsh, 787 F. Supp. at 1540 (C-50 to C-51) (emphasis added).

The Court of Appeals

A divided court of appeals affirmed on the ground that Boy Scouts is not covered by Title II because it is not an organization that serves the public and is not a place of public accommodation. *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1278 (7th Cir. 1993) (A-23). The majority also found that Boy Scouts is exempt from Title II under subsection (c) because it is a private club and "Congress expressly excluded private clubs such as the Scouts from the operation of the statute. The Boy Scouts of America qualify as a private club because its Constitution and Oath contain requirements that serve to purposefully exclude nonqualifying applicants." *Id.* at 1278 (A-23).

In affirming on these statutory grounds, the majority noted that "[o]bviously, the discussion of the Boy Scouts' purpose and its right to determine whom to admit into membership impacts a constitutional right to Freedom of Association." *Welsh*, 993

F.2d at 1277 (A-22). The majority also noted that "[a] great deal is at stake in the interpretation of statutes such as Title II" because history teaches that it is "through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young" that a virtuous, responsible citizenry exists:

> When the government . . . through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Id. at 1278 (A-23 to A-24).

The dissent disagreed with the majority's interpretation of the statute, but would have upheld Boy Scouts' right to exclude those who do not share its belief in God directly on constitutional grounds "because the First Amendment protects organizations from having to accept those who do not share its most elementary beliefs." *Welsh*, 993 F.2d at 1279 (A-25). According to the dissent, "[t]he Scouts would suffer just the type of injury the First Amendment was designed to prevent if forced to admit members who refuse to subscribe to the organization's basic philosophy." *Id.* at 1283 (A-35).

REASONS FOR GRANTING THE WRIT

I. THE CORRECT INTERPRETATION OF "PLACE OF PUBLIC ACCOMMODATION" UNDER TITLE II AND ITS PRIVATE CLUB EXEMPTION TO PRIVATE VOLUNTARY ORGANIZATIONS LIKE THE BOY SCOUTS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

1. Respondent agrees with petitioner that the construction of Title II by the court below presents an important question of federal law which should be settled by this Court. The Court has never addressed the applicability of Title II and its private club exemption to voluntary organizations like the Boy Scouts. Unlike the amusement park operated as a business in *Daniel v. Paul*, 395 U.S. 298 (1969), or the other places set forth in the statute, groups like the Boy Scouts do not primarily provide recreational, entertainment, food or lodging services to the public at large but exist to transmit and express values among their members. These organizations thus implicate the right of freedom of association -- and the cognate freedom not to associate with those of opposing views -- recognized by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors v. Rotary Club*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988).

The petitioner here has never sought access to any particular building but rather to the camaraderie and shared values of a small group of boys doing Cub Scout activities. Indeed, the place in which a Cub Scout Den often meets is the home of the Den leader. Title II manifestly does not reach into peoples' private homes. *See Civil Rights Act: Hearing on H.R. 7152 Before the Subcomm. No. 5 of the House Comm. on the*

Judiciary, 88th Cong., 1st Sess. 1373-74 (1963) (statement of Attorney General Robert F. Kennedy).[5]

Petitioners seek admission to a group for the sake of sharing some of its values and activities without sharing or participating in the most basic belief and responsibility of all -- acknowledging belief in and duty to God, the foundation for Boy Scouts' system of ethical values. The Declaration of Religious Principle in Boy Scouts' By-Laws repeats the same words that the first Boy Scout Handbook told the first American Boy Scouts about their duty to God:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members.

(S.A. 18, 124.)

Where intimate association and expression of moral and religious beliefs are involved, the basis for applying a public accommodation statute does not exist; unlike the reasons for

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[5] In the section of Title II dealing with hotels and other temporary lodging, the statute expressly rejects the notion that a home, even one which caters to the public for commercial gain, could be a place of public accommodation. *See* 42 U.S.C. § 2000a(b)(1) (excepting guest house "which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence").

patronizing a restaurant, a motel, a public park or a movie theater, the reasons access is sought to organizations such as Boy Scouts are the intangibles of sharing a set of values and a sense of belonging -- enjoying the special quality of a group which comes together to reinforce its beliefs in the way it believes most effective. The food in a restaurant and the size of a bed in a motel do not change regardless of who eats or sleeps there. But the special quality of a volunteer organization and the values for which it stands would change and even perish if accommodations had to be made for those of contrary values. Frightening indeed would be that nation whose government could dictate the membership requirements of churches, synagogues, B'Nai Brith, Alcoholics Anonymous, patriotic societies and political parties -- of any group that, by standing together, sought to stand for anything.

The Court should take this opportunity to clarify where rights of association begin and where ingenious expansions and interpretations of public accommodation laws must end. The absence of definitive guidance from this Court is causing severe harm to voluntary organizations like the Boy Scouts. There has been no time during the last seventeen years when at least one public accommodation law challenge to the Boy Scouts has not been pending. Such challenges, moreover, have markedly increased in recent years. Presently, six other court cases and at least three administrative proceedings are pending across the country from California, Illinois and Kansas to New Jersey, Pennsylvania and the District of Columbia. (See *infra* at 22-23.) The record in this case presents a timely opportunity for resolution of these questions. The parties and the district court conducted the trial with conscious recognition of the need for a full record on all statutory and constitutional issues. *See*

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992) (B-1).[6]

2. The Court also should address the related question of the availability of the private club exemption, 42 U.S.C. § 2000a(e) (1988), to voluntary organizations like Boy Scouts. While the dissent concluded that it would be "swimming upstream" and an "extreme" reading of the exemption to suggest that an organization as popular as Boy Scouts could qualify as a private club, the majority correctly held that the determinative factor is not the success or popularity of an organization but the "nexus between the organization's purpose and its membership requirements." *Welsh*, 993 F.2d at 1277, 1282-83 (A-22, A-33 to A-34).

The lower courts have looked at many factors to determine whether an organization is genuinely selective and private. But as in *Daniel v. Paul* itself, 395 U.S. 298, 301-02 (1969), the cases denying private club status have invariably involved sham requirements or subterfuges imposed simply to circumvent Title II, not basic, long-held organizational beliefs comparable to the Boy Scouts' belief in God. *See, e.g., United States v. Lansdowne Swim Club*, 713 F. Supp. 785, 796-97 (E.D. Pa. 1989) (swimming facility with membership cards available to all whites for a membership fee), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *United States v. Johnson Lake Inc.*, 312 F. Supp. 1376, 1379 (S.D. Ala. 1970) (corporate recreational complex with membership available to whites who previously patronized the facilities); *see also Nesmith v. Young Men's Christian Association*, 397 F.2d 96, 101-02 (4th Cir. 1968) (YMCA building and

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[6] As the district court remarked at the conclusion of trial, "[i]t is such a difficult and challenging issue, but I am very honored and privileged to be the person to start this case on its way up to the Supreme Court of the United States." (Trial Transcript 654:16-19.)

athletic facility which had no standards for admission and held no membership meetings).

Title II expressly states that its provisions do not apply "to a private club or other establishment not in fact open to the public." 42 U.S.C. § 2000a(e) (1988). The legislative history reflects a Congressional understanding that Boy Scouts is a "private club."

Title V of the 1964 Civil Rights Act, which addresses the scope of the Civil Rights Commission's investigative authority, exempts "any private club" from the Commission's authority to collect and distribute information concerning discrimination in the use of public facilities. *See* 42 U.S.C. § 1975c(a)(4), (b) (1988). The draftsman of the Title V private club exemption was asked during floor debate whether the exemption would include "such organizations as the *Boy Scouts of America*, the Girl Scouts, the Future Farmers of America, the 4-H Clubs -- that type of organization." He replied: *"That would be covered by the term 'private club'* like the Kiwanis Club, the Lions Club, and so forth." 110 Cong. Rec. 2296 (daily ed. Feb. 6, 1964) (Statements of Rep. Williams and Rep. Meader) (emphasis added). In enacting the Civil Rights Act of 1964, then, Congress expressly adverted to the Boy Scouts as a private club.

The dissent's view that numbers are determinative would lead to the dangerous holding that nothing in the Act prevents its application to the membership requirements of *any* popular, nationwide organization which has been successful in attracting members, including churches and political groups. If this be so, Congress would not only have crafted a strange, paradoxical statute but one posing profound constitutional questions. Fringe groups with extreme messages and few members might not be covered by Title II, while organizations with goals and methods

attractive enough to make them potentially effective voices and "seedbeds of virtue" would be prevented from requiring that members share the very beliefs which the group exists to express and the sharing of which gives the group the cohesiveness to make its message effective.

II. THE FIRST AMENDMENT RIGHT OF VOLUNTARY ORGANIZATIONS TO ESTABLISH MEMBERSHIP REQUIREMENTS REFLECTING THEIR RELIGIOUS AND MORAL VALUES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Every opinion in the courts below acknowledges that the issues in this case center on the First Amendment freedoms of expressive and intimate association recognized by this Court in *Roberts*, 468 U.S. 609, *Rotary Club*, 481 U.S. 537, and *New York State Club Association*, 487 U.S. 1. The basic principle is that -- no matter how a particular public accommodation law may be worded -- Boy Scouts cannot be required to admit into their association one who does not believe in that which leads people to associate as Scouts in the first place. As the Court made clear in *Roberts*:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation *may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.*

Roberts, 468 U.S. at 623 (emphasis added).

Nowhere is this more clear than in a case involving an organization whose values are based on a belief in God and whose activities are designed to foster the social, spiritual and moral growth of members' children in their own and their like-minded neighbors' private homes. Whether viewed in terms of personal autonomy and expression or in terms of assuring effective voices for expression of beliefs in the "marketplace of ideas," the freedom to associate in private groups and form volunteer organizations independent of both the government and the commercial sector should be recognized as a fundamental aspect of the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). *See generally* James Douglas, *Why Charity? The Case for a Third Sector* (Sage 1983).

The district court, although deciding the case on statutory grounds, noted "the clash between individual and associational rights which is highlighted in the context of this case." *Welsh*, 787 F. Supp. at 1540 (C-51).

The majority in the court of appeals similarly understood the significance of the associational freedom at issue:

> A great deal is at stake in the interpretation of statutes such as Title II. The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others. The central question of those concerned about maintaining the health of our republic must be, 'how do individuals acquire the virtues necessary for self-government?' History provides only one answer: through the institutions of civil society,

> like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young . . . .

Welsh, 993 F.2d at 1278 (A-23).

In Judge Cummings's dissent, he specifically argued that the case should have been decided on constitutional grounds rather than "unduly narrow" statutory ones. In Judge Cummings's words:

> [T]he inquiry should not end there [with the words of the statute] because the First Amendment protects groups from having to admit those who do not share their most fundamental beliefs. *The right of association is among the most precious of liberties guarded by the Bill of Rights.* In *my opinion, the majority erred in failing to reach this constitutional issue.* My inclination would have been to hold that the Scouts could exclude atheists under a line of free association decisions suggesting that individuals may form groups in the pursuit of political, social, economic, educational, religious and cultural ends. '[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.' *The Scouts would suffer just the type of injury the First Amendment was designed to prevent if forced to admit members who refuse to subscribe to the organization's basic philosophy . . . .*

Welsh, 993 F.2d at 1283 (A-34 to A-35) (emphasis added) (internal citations omitted).

Justice O'Connor, in her concurring opinion in *Roberts*, even without benefit of the full record developed in this case regarding the nature and religious component of Scouting, explicitly recognized the expressive purposes of Scouting.

Justice O'Connor observed that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636 & n.* (quoting Paul Fussel's essay on the Boy Scout Handbook).

This case presents an especially compelling vehicle for delineating the scope of associational freedom because it involves rights of intimate association as well as expressive association. Boy Scouts, though a national organization, expresses its message to Cub Scouts primarily through interaction of small neighborhood groups -- Cub Scout Dens -- meeting with adult volunteer leaders in those leaders' private homes. *Welsh*, 787 F. Supp. at 1515-16, 1519-20 (C-6 to C-8, C-13 to C-14) (Stip. ¶¶ 8, 16, 23; Findings ¶¶ 4-6).

The membership requirements of Cub Scouts and Boy Scouts are also bound up with choices made by parents -- choices about the moral and religious upbringing of their children and the persons to whom they wish to open their homes. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In this case the personal associational interests at stake are particularly striking because the value choices revolve around a basic question of religious and related ethical belief: belief in God and acknowledgment of such a belief as the foundation for the system of moral and ethical beliefs embodied in the Boy Scout Law.

Government may not "establish" secularism by preferring non-religious belief over religious belief. *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Freedom of association must permit a voluntary association limited to those

who profess belief in God just as clearly as it permits an all-agnostic club. As the Court stated in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), quoting with approval Justice Douglas's dissent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972):

> The associational rights which our *system honors permit* all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or *all agnostic clubs to be established.*

Gilmore, 417 U.S. at 575 (emphasis added). An order to admit those unwilling to profess belief in God would fundamentally change the character of the Scout Oath, the Scout Law and the message sought to be inculcated by all Scouting activities -- from camping trips in the great outdoors where boys "are learning about God's beautiful world," to meetings begun with prayers and ended with benedictions, to the Cub Scout advancement program with its required religious achievements. (S.A. 41, 55, 78-80, 91-96, 106-07, 161-62.)

An association advancing particular viewpoints may legitimately determine membership on the basis of whether the proposed members "have a different view or agenda with respect to these matters." *New York State Club Association*, 487 U.S. at 13; *Roberts*, 468 U.S. at 627 (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) (recognizing the right of a political party to exclude those with adverse political beliefs)). Neither Title II nor any other statute could constitutionally mandate plaintiffs' admission when to do so would be to impair the ability of Scouts to associate, to "advocate public or private viewpoints," and to require the Boy Scouts "'to abandon or alter' . . . activities that are protected by the First Amendment," *New York State Club Association*, 487 U.S. at 13

(quoting *Rotary*, 481 U.S. at 548) -- and particularly not on matters of religious belief.

A State-mandated orthodoxy making God in the Boy Scout Oath and the Cub Scout Promise an option rather than the organization's bedrock value would force Boy Scouts to become as much a vehicle for the values of secular humanism as for Boy Scouts' own chosen values. No matter how the language of Title II or its many and varied State counterparts might be worded, no statute can constitutionally require that the opinions of secular authorities become more important to Scouting's programs than the guidance of the Scouts' volunteer chaplains or the ecumenical efforts of the volunteer members of its Religious Relationships Committee (see S.A. 172-75, 180-83, 185, 195-98, 200-04).

This case squarely poses the conflict recognized but not resolved in *Roberts*, 468 U.S. 609 and *Rotary*, 481 U.S. 537. In *Roberts* and *Rotary*, the Court found that the membership requirements at issue were unrelated to the groups' expressive goals because there was no distinction between the potential expression of the excluded class and the current expression of the membership, and because the groups served primarily commercial rather than expressive purposes. *See Roberts*, 468 U.S. at 627-8; *Rotary*, 481 U.S. at 548-49. The record here and the district court's findings make clear that the Boy Scouts is a completely different organization from those in *Roberts* and *Rotary*, and that there is an inescapable nexus between the Boy Scouts' goals and values and its membership requirement.

These constitutional issues are even more important than the correct construction of two phrases in Title II. Many states and localities have their own public accommodation laws or ordinances which may or may not be based on the concept of

"place" and may or may not have a private club exemption.[7] Unless the constitutional limits of these laws are clearly established, voluntary membership organizations like Boy Scouts will suffer continual assaults on their ability to associate only with those who share their basic beliefs.

Including this case, Boy Scouts or its local volunteer Councils are presently defending nine lawsuits or administrative proceedings seeking to change its membership requirements in six jurisdictions, and have been threatened with others. Several of these cases involve the duty to God requirement; others involve the moral values and membership requirements which prevent known or avowed homosexuals from becoming Scout leaders.

Even when the Boy Scouts defendants have prevailed,[8] the proceedings have frequently dragged on for many years,[9] and

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[7] *See, e.g.*, 43 Pa. Con. Stat. Ann. § 954(1) (Supp. 1992) (Pennsylvania Human Relations Act includes private club exemption); N.J. Stat. Ann. § 10:1-5 (1993) (New Jersey public accommodation law includes private club exemption); Ct. G.S.A. § 46a-64 (1993) (Connecticut public accommodation law does not include a private club exemption); M.G.L.A. c. 272, §§ 92A, 98 (1993) (Massachusetts public accommodation law does not include a private club exemption); Cal. Civ. Code § 51 (1971 & Supp. 1987) (California public accommodation law drafted to cover "business establishments").

[8] *See, e.g., Department of Human Rights v. Boy Scouts of America*, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); *Mankes v. Boy Scouts of America*, 137 F.R.D. 409 (S.D. Fla. 1991); *Quinnipiac Council v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

[9] *See, e.g., Quinnipiac Council v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987) (11 years); *Curran v. Mount Diablo Council*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (12 years and still at intermediate state appellate level).

many are yet unresolved.[10] In these cases the constitutional issue may not be reached until months or years of litigation have occurred, and that ultimate issue may be resolved much differently from one state to another -- and much differently from the way in which it would be resolved by this Court.

The cost simply of defending these actions as they may be brought -- today in one state or county or municipality, next week or next month in another -- are themselves a tremendous burden, both in terms of expense and diversion of resources, for a volunteer organization such as Boy Scouts. The cost of a loss in any one jurisdiction would impact the Scouting movement nationally. The Boy Scouts' mission would be severely compromised as soon as its values ceased to be the same in Orange County, California as in Cook County, Illinois. The essence of Scouting is the consistency of its message. All Scouts say the same Oath and learn the same Law -- not a Law recited as written in some parts of the country and with key words omitted in others. Moreover, the testimony in this case confirms that any threat to the religious content of Scouting would alienate and threaten the disassociation of many parents, volunteers, Scout leaders and religious groups sponsoring Scouting units. (S.A. 160, 186, 198-99, 203-04, 228-29.)

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[10] *See, e.g., Merino v. San Diego County Council*, No. 659236 (trial scheduled); *Dale v. Boy Scouts of America*, No. Mon-C-330-92 (summary judgment motion pending); *Seabourn v. Coronado Area Council*, No. 92 C 140 (Kan. Dist. Ct. Aug. 31, 1993) (for Boy Scouts on statutory grounds); *Curran v. Mount Diablo Council*, No. C 365529, slip op. at 8 (Los Angeles County Super. Ct. July 25, 1991 (for Boy Scouts on constitutional grounds holding Boy Scouts' programs to be "overwhelmingly expressive"), *appeal docketed*, No. 2 Civ. B061869 (Cal. Ct. App. Sept. 27, 1991), *appellate argument scheduled* (Cal. Ct. App. Dec. 2, 1993); *Randall v. Boy Scouts of America*, No. 650394 (Orange County Super. Ct. June 30, 1992) (against Boy Scouts on statutory and constitutional grounds), *appellate argument scheduled*, No. G012774 (Cal. Ct. App. Nov. 16, 1993). In addition, there are administrative cases in Pennsylvania and the District of Columbia.

These people testified again and again that they devote so much time and energy to Scouting because it does unequivocally have a religious foundation. (S.A. 160, 164-65, 167-68, 198-99.)

Burdens of litigation should not be permitted to chill the exercise of First Amendment freedoms. Boy Scouts consists of parents, children and volunteers in small towns, suburbs and cities across the United States who devote untold time to this volunteer movement because they believe in its values and its methods. For many of them, the values of the Scout Law indelibly engraved in memory are a guide to their conduct throughout life. These people have every bit as much a need and right to know what their rights are as the plaintiffs who sue to be made members of Boy Scouts while rejecting its most basic values.

CONCLUSION

For all of the following reasons, the petition for a writ of certiorari should be granted on the questions presented herein.

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Respectfully submitted,

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